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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO A. RODRIGUEZ,

Defendant and Appellant.

B207107

(Los Angeles County
Super. Ct. No. VA096753)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Marco A. Rodriguez (appellant) was convicted by a jury of second degree murder. The jury also found that he personally used a knife in the commission of the offense. (Pen. Code, §§ 187, subd. (a); 12022, subd. (b)(1); 1192.7, subd. (c)(23).) He was sentenced to 15 years to life. He appeals, contending that the court erred by refusing to instruct the jury on voluntary manslaughter based on the theory of imperfect self-defense and by excluding evidence of the victim's prior violent acts and drug use. We find each of these contentions to be without merit and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim Judy Morales and appellant had been in a dating relationship. On the night of August 10, 2006, Morales was in her apartment with Francisco Montes, whom she was then seeing, Crystal Guerrero, and Mike Navarro. Morales and Montes went into Morales's bedroom and shut the door. Appellant arrived, forced his way into the apartment and then into Morales's bedroom. Montes came out of the bedroom and Morales and appellant began arguing loudly.

Valerie Soto, who lived in the same apartment building as Morales, called 911, saying she had heard a woman yelling in Morales's apartment. Downey police officers arrived at Morales's apartment. The apartment door was open but no one responded to their calls. They entered the bedroom and found appellant lying on top of Morales. There was a knife lying next to his hand. Morales's eyes were open and she was lying still. Her breathing was shallow and she emitted gurgling sounds. There was blood all over the floor, walls, and ceiling. Officers pulled appellant off Morales and handcuffed him. Appellant had 30 to 40 stab wounds in his chest and 10 to 12 wounds in his leg. The chest wounds were very close together and were not life threatening. The wounds to the leg were not serious. Morales was taken to the hospital where she later died from multiple stab wounds.

Guerrero testified that she and Morales were close friends. In August 2006, she was living in Morales's apartment and, at that time, Morales was dating Montes. She

knew appellant was Morales's ex-boyfriend. Early in the morning, approximately one week before the killing, Guerrero heard Morales screaming at someone to leave. On the night of the incident, she saw Morales in appellant's car. Appellant had his hands around Morales's neck, as if he were choking her. Guerrero went upstairs and waited for Morales, who appeared five to ten minutes later, crying and upset. Montes arrived, and he and Morales went into her bedroom and shut the door. Later, appellant came to the apartment and forced his way in. He demanded to know who was there and went straight to Morales's bedroom. He and Morales began yelling at each other, and Morales got the telephone to call the police. Appellant began questioning Montes, and Montes came out of the bedroom. Shortly thereafter, they heard Morales screaming, "Help, help, help," and calling out for Valerie. Guerrero heard appellant yelling, "Shut up" and "Stop." It sounded like appellant was hitting her and there were sounds of glass breaking. Guerrero and Montes unsuccessfully tried to open the bedroom door. The neighbors and the police arrived about five minutes later. Guerrero did not see appellant with a knife. She never thought that appellant would seriously injure or kill Morales. Guerrero said she knew that Morales had a drug problem and would use methamphetamine up to three times a week, which made Morales more anxious and jumpy.

On cross-examination, Guerrero admitted she was a convicted felon but denied using drugs. She also conceded that when police interviewed her after the incident she did not tell them that she saw appellant choking Morales earlier in the evening. In addition, she did not tell the police that she tried to open the bedroom door after appellant and Morales began arguing.

Montes testified that he had been dating Morales for a few months. He knew she had just broken up with appellant and that they were still having arguments. He said that one week before she was killed, Morales told him that appellant had held a knife to her throat. On the night of the attack, Montes was in the bedroom with Morales when appellant arrived. Shortly thereafter, appellant kicked the bedroom door open and demanded to know who Montes was. Morales picked up the telephone, but appellant grabbed it and took the battery out. Morales and appellant told Montes to leave and he

went to the living room where Guerrero was located. He then heard Morales frantically and repeatedly screaming, “No,” and appellant say, “Die, bitch.” Montes and Guerrero went outside and stayed there until police arrived. He did not see appellant with a knife. Montes stated that Morales told him that she had used methamphetamine in the past, but he was not aware that she was currently using it. He did not notice that she was anxious or agitated on the day of the homicide.

Valerie Soto testified that Morales told her in the past that appellant had given her a black eye during an argument. One week prior to the incident, Morales came to Soto’s apartment early in the morning and said that appellant had put a knife to her throat. Soto told Morales to call the police but Morales said she did not want to get the police involved. On a prior occasion, Morales told Soto that she had a fight with appellant while holding a curling iron and that appellant had been burned. Morales never told Soto that she was using methamphetamine, and Soto did not suspect she was.

Luis Soto, Valerie’s husband, testified that approximately one week before the killing, Morales’s son came over to their apartment and told him that appellant was hurting his mother. Luis went to Morales’s apartment and called her name. She came out and told Luis to be careful because appellant had a knife.

Dr. Juan Carrillo, a deputy medical examiner for the Los Angeles County Coroner’s Department, performed an autopsy on Morales. She had sustained 26 stab wounds, 10 of which were potentially fatal. The wounds appeared to have been inflicted with the same instrument and at the same time. She also had bruises on her legs, arms, head, and both sides of her neck. Dr. Carrillo opined that some of Morales’s wounds were “defensive-type wounds,” the kind that are inflicted when a person tries to protect oneself. Dr. Carrillo also found methamphetamine and amphetamine in her blood samples.

Appellant did not testify. He called his sister Vilma Rangel and a criminalist, Dewayne Beckner, as witnesses on his behalf. Beckner testified that the amounts of methamphetamine and amphetamine in Morales’s blood at the time of her death were significant and demonstrated recent use. He said that aggression and violence are

consistent with methamphetamine use. He also stated that the “messy” state of Morales’s apartment was consistent with methamphetamine use.

Rangel testified that she had once heard Morales and appellant fighting and when she went into their room, Morales was holding a broken bottle and appellant was “holding his head, because she had broken the bottle on his head.” Morales later told Rangel that she was violent that day because she was using methamphetamine. Rangel testified that appellant did not use methamphetamine and was not violent.

DISCUSSION

I. Jury Instructions

The trial court instructed the jury on voluntary manslaughter under the theory of sudden quarrel or heat of passion. Appellant contends it should also have informed the jury that it could convict him of voluntary manslaughter under the theory of imperfect self-defense. We are not persuaded.

During a conference on jury instructions, appellant’s counsel did not request an instruction on imperfect self-defense. In fact, when counsel was specifically asked by the trial court if appellant was relying on that theory, counsel said he was not. As a result, the court modified the language of CALJIC Nos. 8.40 and 8.50, the voluntary manslaughter instructions, by deleting any reference to an actual but unreasonable belief in the necessity to defend oneself against imminent peril. It also did not give CALJIC No. 5.17, the instruction which defines an actual but unreasonable belief in the need to act in self-defense.

Appellant now claims that the court erred by redacting CALJIC Nos. 8.40 and 8.50 and by failing to instruct the jury with CALJIC No. 5.17. He asserts the court had a sua sponte duty to give the imperfect self-defense instructions, even though they were inconsistent with his theory that he killed in the heat of passion.

The Attorney General argues that because defense counsel told the trial court that appellant would not be pursuing a theory of imperfect self-defense, any alleged error was

invited. In order to forestall a later claim of ineffective assistance of counsel, we address the merits.

A trial court must instruct on lesser included offenses when the evidence warrants it, regardless of the theories proffered by the parties. (*People v. Barton* (1995) 12 Cal.4th 186, 203.) “[T]he existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense” (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) There must be substantial evidence that would allow a reasonable jury to find that defendant was guilty of the lesser offense but not the greater. (*Ibid.*) ““Substantial evidence is evidence sufficient to ‘deserve consideration by the jury,’ that is, evidence that a reasonable jury could find persuasive.”” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.)

“Imperfect self-defense is the actual, but unreasonable, belief in the need to resort to self-defense to protect oneself from imminent peril.” (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178.) In this case, there was no need for the jury to be instructed on this theory, as there was no evidence that appellant was in fear of imminent peril when he attacked Morales. On the night of the incident, he was the aggressor. He choked Morales as they sat in his car. Later, he forced his way into the apartment and kicked open Morales’s bedroom door. Morales was the one who cried for help during the assault. No one heard appellant ask for assistance. Indeed, he was heard saying, “Die, bitch,” after Morales began screaming. Finally, the coroner testified that Morales had “defensive-type wounds.” The evidence that Morales had struck appellant and burned him with a curling iron during past arguments was not enough to suggest that he was in fear of imminent peril on the evening in question. The trial court properly did not instruct on the theory of imperfect self-defense.

II. Excluded Evidence

Prior to opening statement, the prosecutor requested a ruling on whether evidence of Morales’s past drug use could be admitted. Defense counsel stated, “I would indicate to the Court I believe the evidence that we’ll be presenting will show that her . . .

irrational and violent behavior is oftentimes, if not always, consistent with her meth use That the victim's past use of methamphetamine would exhibit itself in signs of irrational and/or violent behavior, which would then be evidence that the meth use on August 11th would have been consistent with irrational and violent behavior." The court then ruled as follows, "If [you] establish that foundation, I suppose it is okay. It will come in just to show she was irrational and violent on this occasion."

During opening statement, defense counsel referred to Morales's history of using methamphetamines in addition to having a significant amount of methamphetamine in her system on the night she was killed. He also referred to past violent acts by Morales against appellant.

Prior to the defense presentation of its case, there was a bench conference in which the defense sought to introduce testimony by Rangel, appellant's sister, that Morales used drugs on a prior occasion. The court ruled that Rangel could testify about an incident when Morales struck appellant with a bottle but that she should not discuss Morales's history of drug use. Defense counsel asked whether he could submit a tape recording of an expletive-laced message left by Morales on appellant's answering machine which was accompanied by the sound of someone hitting a refrigerator. Defense counsel also had a picture of a dented refrigerator. Counsel argued that the evidence showed the victim's propensity for violence. The court stated, "That's not admissible. There's too many inferences you got to make. That is not admissible."

Appellant argues that the trial court erred by excluding evidence of Morales's recorded message and other acts when she physically abused him while under the influence of drugs. He argues that the evidence was relevant to establish his heat of passion and self-defense theories. We disagree.

We start with the recorded telephone message. Appellant's trial counsel urged that the message and the photograph of the damaged refrigerator went to show the victim's "propensity for violence." As the trial court observed, it is difficult to infer that Morales's act of striking an inanimate object while out of appellant's presence tended to show that she had a propensity to act violently toward people in general or appellant

specifically. The trial court has broad discretion in assessing whether the probative value of evidence is outweighed by its tendency to constitute an undue consumption of time or confuse the trier of fact, and unless it exercises that discretion in an arbitrary manner, the ruling must not be disturbed. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124.) The court did not abuse its discretion in finding that the probative value of the proffered evidence was lacking.

Appellant also claims the telephone message was an example of how Morales provoked him to attack her. It is difficult to assess the relevance of the message because we do not know when it was left. Nonetheless, we conclude that error, if any, was harmless. As appellant's trial counsel argued, appellant was angered by events which closely preceded the homicide. Appellant and Morales had a tumultuous relationship. Although they had broken up, Morales still called appellant and asked him to provide transportation for her and continued to leave with him whenever he appeared at her workplace. Appellant was troubled by the fact that he paid the rent on Morales's apartment and she saw other men there. They had a violent argument one week before the killing when Morales accused appellant of threatening her with a knife. Afterwards, appellant told Luis Soto that he knew Morales was seeing another man and appellant just wanted Morales to tell him that their relationship was over. The jury had ample evidence upon which to conclude that appellant attacked Morales while in the heat of passion and it rejected his claim. We cannot say that it is reasonably probable that evidence of an undated telephone message would have caused the jury to find otherwise. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

We address the evidence regarding Morales's drug use. Appellant contends the trial court excluded evidence of other instances when Morales physically abused him while under the influence of drugs, however, his assertion is belied by the record. Appellant sought to introduce the incident when Morales struck appellant with a bottle and the aforementioned tape of the telephone message. Appellant presented testimony on the former and we have discussed the latter. As to the trial court's exclusion of evidence that Morales used drugs on other occasions, we discern no error. The jury heard

Guerrero's testimony that Morales used methamphetamine up to three times a week and acted more anxious and jumpy when she did so. The defense expert opined that aggression and violence are consistent with methamphetamine use. The coroner testified Morales had methamphetamine in her system at the time of her death. Any other evidence concerning Morales's drug use was cumulative.

DISPOSITION

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.